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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY AND
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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January 4, 2005

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner, Illinois Central Railroad Company, has consented to AAR's filing of a brief.[1] Respondent, Kelli Smallwood, has refused consent. AAR has recently learned that respondent has waived her right to file a response to the petition and, therefore, in order to facilitate this Court's prompt review of the case, AAR is filing its motion and brief early.

[1] The letter expressing consent has been filed with the Clerk of the Court.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.[2]

One area in which AAR has worked on behalf of its member railroads is in helping to create and maintain a favorable litigation environment, both with regard to substantive and procedural issues. AAR's member railroads operate nationwide and are named as defendants in courts throughout the United States. Depending on the jurisdiction in which suit is brought, and the nature of the claims made, railroad defendants may wish to exercise their right to a federal forum when federal law provides that option. This case, and the legal issues it raises, including the federal preemption defense, is far from unique, and is exactly the kind of case in which a federal forum is likely to be desired. As a result of the decision below, there is a growing conflict over whether a railroad would be entitled to a federal forum in such a case. Thus, AAR's member railroads have an especially strong interest in having that conflict resolved.

As a trade association representing the nation's major railroads, AAR can play a valuable role in bringing the railroad industry's perspective to the Court's attention. AAR

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[2] *E.g., Consolidated Rail Corp. v. Richards*, 124 S.Ct. 961 (2003); *National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

has had a long standing involvement in rail safety issues, including those related to grade crossings, in the legislative, regulatory and judicial arenas. AAR has supported the concept of federal preemption as an important tool for maintaining the national uniformity of regulation that is essential in the rail industry. Finally, AAR maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide, frequently in litigation that raises the same legal issues as the case below.

The decision below, and its implications on the right to a federal forum, will impact a significant portion of the railroad industry, not just the individual railroad involved. Thus, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The interest of *amicus curiae* Association of American Railroads (AAR) is set forth in the Motion For Leave To File A Brief *Amicus Curiae.*

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of petitioner.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

While the important question related to federal diversity jurisdiction presented in the petition is no doubt of interest to all corporate defendants, it has particular relevance to railroads, as the tactic used by the plaintiff in this case to defeat federal diversity jurisdiction is likely to become a common feature in railroad litigation. In this typical railroad crossing accident case, the Fifth Circuit reversed the district court, finding that since the federal preemption defense which barred a claim against the in-state defendant state agency also protected the railroad, joinder of the agency was not fraudulent. The concept of federal preemption frequently plays a role in railroad litigation, particularly in cases that arise out of grade crossing accidents. Crossing suits are common, and typically include claims related to the crossing warning devices. The preemption defense, which bars state tort claims related to the adequacy of federally-funded crossing warning devices, applies to all defendants named in these cases.

Because crossings are ubiquitous, railroads are potentially subject to suits arising out of crossing accidents in virtually every jurisdiction throughout the nation. Where the plaintiff and defendant are not citizens of the same state, Congress has granted the defendant the right to remove the case to federal court to avoid potential state court bias in favor of a local plaintiff, and railroads often seek this option in crossing cases. The ruling below provides an in-state plaintiff with the ability to defeat federal diversity jurisdiction by also naming the in-state transportation agency with jurisdiction over the crossing, even though there is no chance of recovery against the agency. Other federal courts would not permit this device to defeat diversity jurisdiction, leaving a defendant's right to remove such a case in a state of confusion that will uniquely impact the nation's railroads.

ARGUMENT

I. BECAUSE THE CASE BELOW REPRESENTS A COMMON SCENARIO IN RAILROAD GRADE CROSSING LITIGATION THE RAILROAD INDUSTRY HAS A PARTICULAR INTEREST IN A RESOLUTION OF THE CONFLICT IN THE COURTS OF APPEALS ON THE PROPER FRAUDULENT JOINDER ANALYSIS

A. As in the Case Below, Plaintiffs Typically Attempt to Litigate Crossing Accident Cases Against Out-Of-State Railroad Defendants in State Court

Petitioners have convincingly demonstrated the need for review of this case by this Court. Failing to resolve the split among the federal circuits on the proper fraudulent joinder analysis will perpetuate a lack of uniformity with regard to an important threshold issue in numerous lawsuits: a litigant's right of access to the federal courts. Adding to the significance of the issue is that the split among the circuits arises from conflicting interpretations of a prior decision of this Court. *Chesapeake & Ohio Ry. v. Cockrell,* 232 U.S. 146 (1914). Moreover, as petitioner correctly argues, the issue presented will recur with great frequency and, as a result, will "persistently affect the exercise of federal court jurisdiction." From the standpoint of the railroad industry, this observation rings especially true.

The railroad industry has a particular concern over the decision below, not because the case involves a railroad defendant, but rather because the situation that gave rise to this case was hardly an isolated incident. The Fifth Circuit's opinion (as well as the earlier decision by the Third Circuit in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3rd Cir. 1990)), which has forged a tool to enable plaintiffs to defeat federal diversity jurisdiction, is no doubt of concern to all potential

corporate defendants. However, this tool has the potential to be wielded with great frequency against railroad defendants. Litigation arising out of crossing accidents is not uncommon, and frequently involves a plaintiff whose state citizenship differs from that of the railroad defendant. As typified by the case below, the litigation strategy pursued by the plaintiff often results in a dispute over the proper forum for the lawsuit.[2]

This case arose out of an accident at a highway-rail grade crossing, which resulted in a lawsuit being filed under state law attributing allegedly inadequate crossing warning devices to railroad negligence. The complaint was filed in state court. Since the railroad and the plaintiff were citizens of different states the railroad was entitled to remove the case to federal court, 28 U.S.C. § 1332(a)(1); 28 U.S.C. § 1441(a), and chose to exercise that right.[3]

The plaintiff also named as a defendant the Mississippi Department of Transportation (MDOT), the state agency with jurisdiction over state roadways. The same negligence allegation brought against the railroad, as well as a related allegation, was brought against MDOT, both of which attacked the adequacy of the warning devices that were present at the crossing at the time of the accident. Like the plaintiff, MDOT is a citizen of Mississippi, and, arguing that complete diversity did not exist, plaintiff sought to remand the case to state court. In response, the defendants argued,

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[2] In addition to the railroad, the plaintiff in a crossing case often will name as defendants individual members of the train crew who reside in the same state as the plaintiff in an effort to defeat diversity jurisdiction. Frequently, the claims against train crew defendants will be dismissed by the plaintiff before trial so the case the jury hears is only against a corporate defendant and not against the, presumably, more sympathetic individual railroad employees.

[3] The plaintiff is a citizen of Mississippi; the defendant railroad is a citizen of Illinois.

and the district court found, that the claims alleged against MDOT were preempted by federal law and that therefore "Plaintiff has no possibility of establishing a cause of action against MDOT . . . in state court." *Smallwood v. Illinois Cent. R.R.*, 203 F.Supp.2d 686, 694 (S.D. Miss. 2002). Consequently, the court denied the motion to remand, concluding that "MDOT was fraudulently joined and therefore, that its citizenship should not be considered for the purpose of diversity of citizenship analysis under 28 U.S.C. § 1332." *Id.*

The Court of Appeals reversed, finding that joinder was not improper because the preemption defense, which also protected the railroad, "effectively decided the entire case" and that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant." *Smallwood v. Illinois Cent. R.R.*, 385 F.3d 568, 571 (5th Cir. 2004) (en banc), *aff'g*, 342 F.3d 400 (2003). Thus, the district court and (the sharply divided) Court of Appeals concluded that the availability of the defense of federal preemption called for the opposite result regarding the application of the federal diversity statute. (The Third and Ninth Circuits have also reached opposite conclusions on the impact of the availability of a common defense that disposes of the case against both the in-state and out-of-state defendant. [Pet. Br. at 10-11]) Recent developments in the law have rendered the scenario presented here likely to recur in numerous jurisdictions.

B. The Federal Preemption Defense, Which Played a Prominent Role in This Case, Frequently is an Issue in Railroad Litigation

Though it has a long history in the railroad industry, the doctrine of federal preemption has become a prominent, and common, feature in railroad litigation in the past few decades.

Beginning in the late nineteenth century, Congress has taken an active role in regulating railroad safety, *see e.g.*, Safety Appliances Act of 1893 (SAA), c. 196, 27 Stat. 531; Boiler Inspection Act (BIA), c. 103, 36 Stat. 913 (1911), and this Court has long recognized the primacy of federal regulation in this area. *See Illinois Cent. R.R. v. Williams*, 242 U.S. 462, 466-67 (1917) (importance of uniformity of regulation). These statutes have been found to occupy the field in the areas at which they are directed. *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926)(BIA); *Southern R.R. v. Railroad Comm'n*, 236 U.S. 439 (1915)(SAA).[4]

Notwithstanding having previously enacted a number of railroad safety statutes, in 1970 Congress ultimately reached the conclusion that a more comprehensive approach was needed for regulating the important subject of rail safety. Though concluding that the existing federal laws regulating discrete areas of rail safety were "reasonably effective in their respective areas," H.R. Rep. No. 91-1194, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S.C. C. & A. N. 4104, 4106, Congress enacted the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, with the purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 45 U.S.C. § 421 (now codified at 49 U.S.C. § 20101).[5]

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[4] Under the U.S. Constitution, when a state law conflicts with, or frustrates, federal law, the state law must yield. U.S. CONST., Art. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Thus, state law is preempted where federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for states to supplement it, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or where Congress expressly so provides through a statutory enactment. *English v. General Electric Co.*, 496 U.S. 72 (1990).

[5] FRSA was recodified in 1994 and moved to Title 49 of the U.S. Code. Pub. L. No. 103-272, 108 Stat. 745. The recodification was not meant to make any substantive changes to the law's provisions. *See id.* § 6(a).

The driving force behind enactment of FRSA was the recognition by Congress that nationally uniform regulation in all areas of railroad safety was critical. Congress explained that the railroad industry

> has a truly interstate character calling for a uniform body of regulation and enforcement. * * * To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

1970 U.S.C.C.A.N. at 4110-11. Not only did Congress grant the Federal Railroad Administration (FRA) plenary power to regulate rail safety,[6] FRSA declared that "laws, rules, regulations, orders, and standards relating to rail safety shall be shall be nationally uniform to the extent practicable," thereby expressly preempting state law pertaining to railroad safety. 45 U.S.C. § 434.[7] Acknowledging the role some states had already assumed in regulating rail safety, 1970 U.S.C.C.A.N. at 4108-09, Congress permitted those laws to remain in effect, but only "until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such state requirement." 45 U.S.C. § 434. Thus, federal law preempts state law pertaining to railroad safety whenever the Secretary of Transportation issues a regulation "covering the subject matter of the state law." *See CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664-65 (1993). Federal preemption of state law under FRSA applies equally to state common law

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[6] When the Department of Transportation was established, authority for implementing the railroad safety laws enacted by Congress, originally a function of the Interstate Commerce Commission, was delegated to the Federal Railroad Administration, an agency within DOT. Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931 (1966).

[7] The preemptive provision of FRSA is now codified at 49 U.S.C. § 20106.

as it does to acts of a state legislature or regulatory agency. *Id.* at 664.

In *Easterwood*, this Court held that certain types of tort claims may not be brought under state law because they are tantamount to attempts to regulate in areas where federal law takes precedent. Specifically, regulations promulgated by the Secretary of Transportation cover the subject matter of the adequacy of grade crossing warning devices, 23 C.F.R. § 646.214(b)(3)&(4), and, when those regulations are applicable, states may not impose additional or different requirements with respect to the adequacy of such devices. 507 U.S. at 670-71. Those regulations are applicable whenever federal funds have participated in the installation of warning devices. Thus, whenever a crossing is equipped with federally-funded warning devices, state law may not require the installation of different devices, nor adjudicate a defendant legally liable for having failed to do so. *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1995).[8]

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[8] State law attempting to regulate railroad safety is preempted with respect to matters other than grade crossing warning devices. For example, in *Easterwood*, this Court held that the subject of train speed is covered by federal regulation and may not be regulated by states. 507 U.S. at 674-75. As a result, state law negligence claims alleging a train was being operated too fast may not go forward (in the absence of evidence that the federal regulations were violated). *E.g., MacFarlane v. Canadian Pac. Ry. Co.*, 278 F.3d 54 (2nd Cir. 2002); *Michael v. Norfolk & Western Ry. Co.*, 74 F.3d 271 (11th Cir. 1996); *St. Louis SW Ry. Co. v. Pierce*, 68 F.3d 276 (8th Cir. 1995). *See also Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790 (7th Cir. 1999) (Federal regulations preempt a state's two-person crew requirement with respect to certain types of operations.); *CSX Transp., Inc. v. City of Plymouth*, 92 F.Supp.2d 643 (E.D. Mich. 2000) *aff'd*, 283 F.3d 812 (6th Cir. 2003)(FRSA preempts state crossing blocking statute); *Union Pac. R.R. et al. v. Calif. Pub.*

After *Easterwood*, questions related to preemption under FRSA that some lower courts had read as having been left open continued to be frequently litigated; in *Norfolk Southern R.R. v. Shanklin*, 529 U.S. 544 (2000), this Court unequivocally settled those questions. This Court held that federal funding of crossing warning devices triggers preemption regardless of whether (1) the Secretary of Transportation approved the warning devices as adequate; (2) a diagnostic team had reviewed the crossing; or (3) the characteristics listed in the federal regulations, which generally warrant gates and lights, were present at the crossing. *Shanklin* made it clear that these factual issues are not relevant to a preemption defense. Whenever a warning device has been installed with federal funds, state lawsuits alleging that the railroad negligently failed to install adequate warning devices at the crossing must be dismissed, with no further showing necessary. "What States cannot do—once they have installed federally-funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." 529 U.S. at 358.

While railroads are the most commonly named defendants in lawsuits arising out of crossing accidents, the preemptive effect of FRSA does not just apply to railroad defendants. In *Fifth Third Bank v. CSX Corp.*, 306 F.Supp.2d 841, 848-50 (N.D. Ind. 2004), the court rejected the argument that "federal preemption is not available as a defense to any party besides the Railroad." Rather, the court held that the fact that the warning devices had been installed with federal funds immunized the county from liability from claims alleging the inadequacy of the devices. Once federal preemption applies

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Utilities Comm'n, 346 F.3d 851 (9th Cir. 2003) (Preemption of certain state track standards and training regulations); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983)(State lawsuit alleging railroad failed to install additional warning lights on its locomotive preempted.)

to a crossing, "the state as well as the railroad is 'no longer duty-bound in the tort sense, for causes of action based on the adequacy of the crossing safety device.'" *Hernandez v. State of Minnesota*, 680 N.W.2d 108, 114 (Minn. App. 2004) (Concluding "that the state and city have no common law duty that could be violated by failing timely to install additional warning devices." *Id.* at 115).

C. The Scenario Presented in the Case Below is Likely to Recur in Numerous Railroad Cases

Lawsuits arising out of accidents at grade crossings are a significant area of litigation for railroads, and, the federal preemption defense plays a frequent and recurring role in this litigation. Grade crossings, which are the intersections of railroad tracks and roadways, are the locus of the greatest interaction between railroads and the general public. There are over 150, 000 public grade crossings in the United States, with ten states having in excess of 5,000 public crossings within their borders. Federal Railroad Administration, *Railroad Safety Statistics: 2002 Annual Report*, Table 9-2 (2004) (*Railroad Safety Statistics*). Crossing safety has improved markedly in recent decades: in the 20 year period from 1984 through 2003, crossing accidents have decreased by 63 percent, and the number of fatalities has decreased by 56 percent.[9] Nonetheless, accidents at crossings generate a substantial amount of litigation. Over the past five years, 1347 lawsuits related to crossing accidents were filed against railroads. In 2003, in addition to the filing of over 200 such suits, over 1,800 crossing claims were made against railroads,

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[9] In 1984, there were 6,530 such accidents and 543 fatalities; in 2003, there were 2,425 acidents and 239 fatalities. Railroad Safety Statistics are available at the FRA's website at http://www.fra.dot.gov.

many of which could ultimately result in lawsuits.[10] Crossing suits are almost always brought under state law.

Because crossings are ubiquitous, railroads are potentially subject to suits arising out of crossing accidents in virtually every jurisdiction throughout the nation. The large freight railroads and Amtrak operate in numerous states.[11] However, for the purposes of federal jurisdiction, railroads are not considered to be citizens of all the states in which they operate. Rather, as corporations, railroads may be considered citizens of no more than two states for the purpose of federal diversity jurisdiction: the state of incorporation and, if different, the state of the principle place of business. 28 U.S.C. § 1332(c)(1). Congress recognized that "corporations which do business over a large number of States, such as railroads, insurance companies, and other corporations whose businesses are not localized in one particular State" are to be regarded as citizens of "that one of the States in which was located its principle place of business." *Gilardi v. Atchison, Topeka and Santa Fe Ry. Co.*, 189 F.Supp. 82, 85-86 (N.D. Ill.) (quoting from Senate Report 1830, 1958 U.S. Congressional & Admin. News 3102).

The federal diversity statute gives effect to Congress' policy decision to protect out-of-state litigants from perceived state court bias by providing a neutral forum. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 111 (1945); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1855); *Ziady v. Curley*, 396 F.2d 873, 875 (4th Cir. 1968). Consequently, when a railroad is

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[10] Statistics on grade crossing litigation are reported to AAR in an annual survey of member and non-member railroads.

[11] The nations four largest freight railroads all have operations in over 20 states. *See* Class I Railroad Annual Report for 2003 (Form R-1) of Burlington Northern and Santa Fe Railway, CSX Transportation, Norfolk Southern Railroad and Union Pacific Railroad, submitted to the Surface Transportation Board. Amtrak operates in 46 states nationwide. *See* Amtrak Website, http://www.amtrak.com.

sued in state court, if its state of incorporation and principle place of business are different from the state of the plaintiff's citizenship, the railroad is entitled to a federal forum, an option that it is fully entitled to exercise.

Nonetheless, in jurisdictions in two federal circuits, plaintiffs can subvert the congressional policy that provides a federal court option for out-of-state defendants by bringing a claim, clearly precluded by preemption, against an in-state defendant like the state transportation agency. Petitioners point out that MDOT may well find itself embroiled in railroad crossing cases throughout Mississippi. [Pet. Br. at 17] From the standpoint of the railroads, the concern is more widespread. Every state has, within its governmental structure, an agency (akin to petitioner MDOT) with jurisdiction over the state's roadways, which typically includes jurisdiction over the state's public crossings. Thus, the tactic employed by plaintiff in this case may become commonplace not only in Mississippi, but in numerous other states.

Although the state agencies have no role in operating the train, their jurisdiction over the highway-rail intersection makes them a potential target for claims alleging the inadequacy of the crossing warning devices. In cases where federal funds have been expended on the warning devices, preemption forecloses such claims. Yet, in litigation arising from an accident at any one of the nearly 25,000 crossings in the six states within the Third and Fifth Circuits, *see Railroad Safety Statistics*, Table 9-2, railroads can expect the state agency to be used as a device to prevent removal to federal court if that suits the plaintiff's litigation strategy. On the other hand, such a move would be precluded in the states within the Ninth Circuit, *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998), and most likely the Seventh Circuit. *See LeBlang Motors, Ltd. v. Suburu of Am., Inc.* 148 F.3d 680 (7th Cir. 1998). At the same time, the tactic used in the case below may be attempted in courts in the other jurisdictions that have not

yet definitively ruled on whether the "common defense rule" defeats a claim of fraudulent joinder.

This development is particularly troublesome, and relevant, to the railroad industry. Rights under federal law, including jurisdictional statutes, should be uniformly applied. As petitioners demonstrate, with respect to the important question of whether an in-state defendant has been properly joined, instead of uniformity there is confusion and a lack of clarity. This confusion will infect numerous railroad cases, and embolden plaintiff to name additional defendants, against whom they have no expectation of recovery, solely as a devise to defeat the out-of-state railroad defendant's right to remove the case to federal court.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit be granted.

Respectfully submitted,

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